Supreme Court, U.S.
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No. 99-863

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

DON PRINCE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PRO SE SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Additional Questions Presented

1. In a prosecution for conspiracy in violation of 18 U.S.C. § 1958 (a), where only two co-conspirators were indicted but the government's evidence revealed an unindicted co-conspirator, did the trial court commit reversible error as to petitioner by instructing that if the jury found one of the indicted co-conspirators guilty it also must find the other guilty?

2. By instructing the jury that if it found guilty one of the two indicted co-conspirators, it also must find guilty the second conspirator, did the trial court violate petitioner's rights to due process and jury trial?

Pro Se Supplement to Petition for Certiorari

On November 18, 1999 Mr. Jack Swerling, the attorney who represented petitioner, Don Prince, in the courts below, filed a petition for certiorari on petitioner's behalf. This petition was placed on the court's docket on Nov. 22, 1999. Because petitioner is incarcerated in Butner, North Carolina and his counsel is in Columbia, South Carolina, it has been difficult for them to communicate. Therefore petitioner, who was uncertain whether a petition would be filed and had obtained an extension of time until December 15, 1999 to file a pro se petition for certiorari, is filing this supplement to the filed petition and incorporates and adapts the provisions of that petition.

Opinion Below

The unpublished opinion of the Court of Appeals for the Fourth Circuit and the opinion of the United States District Court for the District of South Carolina are in the Appendix to the previously filed petition.

Jurisdiction

Jurisdiction is conferred by 28 U.S.C. § 1254 (1). The decision of the Fourth Circuit took effect on August 17, 1999.

Constitutional and Statutory Provisions

U.S. Constitution, Amendment V provides in relevant part: "No person shall be ... deprived of life, liberty, or property, without due process of law".

U.S. Constitution, Amendment VI provides in relevant part. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...

Statement of the Case

The proceedings below and facts of the case have been stated in the petition for certiorari heretofore filed in the case, which contains a statement of the case that is incorporated herein by reference in this supplement. However, in order to provide a more complete understanding of the two questions presented in this supplement to the petition it is important to call to the Court's attention certain additional facts.

Additional Facts

In light of some of the evidence that had been received at trial and which indicated that George Young was an unindicted coconspirator with the two defendants, the trial judge raised with the parties an issue concerning the jury instructions that should be given:

> THE COURT: The second question regarding the conspiracy counts, the indictment only alleges two conspirators. And so I have the standard conspiracy charge, tells the jury that the government must prove that two or more people formed a conspiracy, and that defendants, at some time, joined the conspiracy, et cetera, et cetera.
>
> But I think here, I just need to say the government must prove that the two defendants formed a conspiracy. There's no allegation that anyone else was a member of the conspiracy; am I correct?
>
> MR. MOORE: Beg one moment, your honor
>
> (PAUSE IN PROCEEDINGS)
>
> MR. MOORE: "Your honor, Ms. Wilson tells me the tapes refer to having someone else going to check on Peachy and check on Peachy's stuff, see if Peachy was, in fact, dead.
>
> I think"--
>
> THE COURT: What about--what is the law on government undercover agents? They cannot be conspirators?
>
> MR. MOORE: They cannot be, so Mr.--just all those are out, they can't be conspiracies.
>
> MR. MOORE: Young was not a government agent at the time he participated in these acts. I guess you could argue if you believe his testimony in full, you could believe that he was not really a co-conspirator, because he was scamming. The jury could probable conclude, however, that he was a co-conspirator, and that he was telling the truth.

As you know, your honor, the jury is free to believe , all or part of a witness' testimony. And they could believe that he really did commit these acts, but he really did intend to help these guys commit the murder At some point may have changed his intention.

I think, your honor, you should tell the jury that the government has to prove that two or more persons, not just the defendants, but two or more persons combined to commit or conspired.

THE COURT: That's the way it reads in what you have been given. Let me give that some more thought. We'll take that up later.

MR. SWERLING: Judge, I point out that the indictment is unique in this case It does not even allege, as others and most indictments do, it's only two of them alleged.

THE COURT: I noticed that; you are right. Trial Transcript Excerpts, July 13, 1996 at 35-36. **see Appendix D.**

Later in the trial the jury instructions were discussed further as they pertained to finding only one of the defendants guilty of conspiracy. The court remarked: "I never had a conspiracy before that was closed in", but one of the attorneys, Ms. Wilson, pointed out, "I know that all the time juries come back with inconsistent verdicts. And this could be one of those situations." Ms. Wilson also asserted: "Well, I think they have a right to have an inconsistent verdict, if they want to." Trial Transcript Excerpts, July 15, 1996 at 143. **see Appendix E.**

After the jury began to deliberate, the same issue was raised by this question from the jury: "In relation to counts one and two regarding the alleged conspiracy, can we render a guilty verdict for one defendant and/or a not guilty verdict for the other defendant." Trial Transcript Excerpts, July 15, 1996 at 213. Subsequently, when the jury presented its note, the court's confusion continued:

THE COURT: It is a matter we discussed earlier. I think the answer to that question is no. Right? I just think that you can't conspire with yourself...Well, I just don't think a jury should be instructed it is appropriate to bring back an inconsistent verdict. Id. **see Appendix F**

THE COURT: Well, should I go further and say that is says a person

cannot conspire with themselves? It takes two or more people to form a conspiracy. In this case the two members of the conspiracy are two defendants, and those two alone. I mean, should I explain the answer, in other words?" Id. At 214. **see Appendix F-2**

There ensued extensive discussion between the court and counsel, after which the court gave a negative answer to the jury's question even though the defense counsel made clear that he was dissatisfied with this instruction. No reference was made in the jury instruction either to the jury's power to render an inconsistent verdict or to the possibility that George Young might be an unindicted co-conspirator with whom Bill Prince but not petitioner Don Prince had conspired.

Reasons for Granting the Writ

I. THE TRIAL COURT'S INSTRUCTIONS MISLED THE JURY WITH RESPECT TO THE ALTERNATIVES LOGICALLY AVAILABLE TO IT.

The indictment charged only two persons, Don and Bill Prince with conspiracy and did not leave open the possibility that there might be an unindicted co-conspirator. Without seeking to amend the indictment, the government offered evidence of an unindicted co-conspirator, George Young. Then, in the instructions to the jury, the trial court failed to inform the jury how to dispose of an alternative that had become reasonably available to it under the evidence - i.e., to find that one, but not both, of the two indicted co-conspirators had conspired with the unindicted co-conspirator. In connection with this alternative, the jury should have been advised that if it concluded that a conspiracy had existed but only one of the two defendants had been a party to this conspiracy, then the other defendant could not have been convicted of that conspiracy.

In this connection, it deserves emphasis that "a conspiracy conviction does not depend for its validity on the identification of co-conspirators. Rather it is sufficient that the evidence

'supports the proposition that such a co-conspirator did exist and that the defendant did conspire with him.'" U.S. v. Winn, 958 F.2d 145, 156-157 (5th Cir. 1991) (citing Rogers v. U.S., 340 U.S. 367, 375, 71 S.Ct. 438, 95 L.Ed. 344 (1951)). "Normally, a criminal defendant can be convicted of conspiring with anyone. The defendant's co-conspirator does not have to be named in the indictment." U.S. v. Lopez, 6 F.3d 1281, 1288 (7th Cir. 1993) (emphasis added).

Petitioner's case is strikingly similar to the Lopez case, where the indictment named only two defendants in a drug conspiracy; however, the trial evidence revealed an additional co-conspirator. One of the defendants named in the indictment was acquitted of the conspiracy count. Id. at 1284. On appeal, Chaidez, the convicted defendant, complained "that the district court effectively amended the indictment when it instructed the jury that Chaidez could be guilty of criminal conspiracy if the jury found that he conspired with a co-conspirator who was not named in the indictment." Id. at 1287. In other words, Chaidez "claim[ed] that the admission of the testimony about Rodriguez [an unmentioned and unindicted co-conspirator], coupled with the jury instructions, told the jury that he could be guilty for conspiring with Rodriguez even though the conspiracy count of the indictment charged that the named co-conspirators conspired only 'with each other'". Id.

The Lopez Court of Appeals concluded that the trial court had not committed plain error on the theory that the court's jury instructions expanded the scope of the conspiracy charged in the indictment. Id., 6 F.3d at 1288. Thus, the appeals panel upheld Chaidez's conspiracy conviction although the only named co-conspirator was acquitted. The court did so because the evidence revealed another unnamed and unindicted co-conspirator.

Likewise, in the case at bar, the indictment named only two defendants and did not mention

any known, unknown or unindicted co-conspirators. Nevertheless, the government's evidence exposed an additional co-conspirator--Young--and the government admitted that the jury could consider Young as a co-conspirator since he was not a government agent. *See* Appendix at D-2. The government also advised the court that "juries come back with inconsistent verdicts. And this could be one of those situations." *See* Appendix at E-1 and E-2.

While it is true that an individual cannot be convicted for conspiring with himself; where evidence clearly demonstrates that another unindicted co-conspirator, known or unknown to the grand jury, was involved in the conspiracy, a conspirator's conviction will not be reversed based upon the reversal of a co-conspirator's conviction. *See* U.S. v. Bell, 651 F.2d 1255, 1258 (8th Cir. 1981). *See also* U.S. v. Sparrow, 470 F.2d 885, 888 (10th Cir. 1972) (defendant's conviction for conspiracy must be affirmed in view of the additional untried co-conspirator named in the indictment, notwithstanding acquittal of the only named codefendant).

In short, where two defendants were charged with conspiracy with others, unknown to the grand jury, to commit an offense, and the evidence sustained the allegation that others were engaged in the conspiracy, the acquittal of one defendant charged is not inconsistent with conviction of the other. Donegan v. U.S., 287 F. 641 (2nd Cir. 1922).

Indeed, the Court of Appeals below has concluded that finding a co-conspirator not guilty did not require defendant's acquittal of conspiracy, even though verdicts would be inconsistent. *See* U.S. v. Thomas, 900 F.2d 37, 40 (4th Cir. 1990) (and cases cited therein); *see also* U.S. v. Mitchell, 146 F.3d 1338, 1344 (11th Cir. 1998); U.S. v. Branch, 91 F.3d 699, 720-722 (5th Cir. 1996); Mapes v. Coyle, 171 F.3d 408, 419-420 (6th Cir. 1999).

In this case, the government presented evidence that Young was not a government agent

and, therefore, the jury could conclude that he was a co-conspirator, although he was not mentioned in the indictment. Indeed, the government admitted that Young could be considered a co-conspirator. Thus, the government caused a constructive amendment of the indictment. *See* U.S. v. Floresca, 38 F.3d 706, 710-712 (4th Cir. 1994) (constructive amendment to indictment occurs when either government, court, or both broadens the possible bases for conviction beyond those presented by the grand jury); *See also* U.S. v. Castro, 89 F.3d 1443, 1452-1453 (11th Cir. 1996). Thus, it is clear that the jury might properly have acquitted petitioner Don Prince but yet convicted Bill Prince on the theory that Bill conspired with Young. However, the jury instructions precluded the jury from choosing that alternative.

"The burden of the exercise of lenity falls only on the Government, and it has been suggested that such an alternative should be available for the difficult cases where the jury wishes to avoid an all-or-nothing verdict. Such an act is, as the *Dunn* Court recognized, an 'assumption of a power which [the jury has] no right to exercise.' But the illegality alone does not mean that such a collective judgment should be subject to review. The fact that the inconsistency may be the result of lenity, coupled with the Government's inability to invoke review, suggests that inconsistent verdicts should not be reviewable." U.S. v. Powell, 469 U.S. at 66.

Petitioner would also direct this Court's attention to the opinion in U.S. v Suppenbach, 1 F.3d 679 (8th Cir. 1993). There, the defendant raised a claim that the trial court's supplemental jury instructions on a conspiracy count was error. Just as with the jury in the case at bar, the jury in Suppenbach, was left confused as to the conspiracy and possible co-conspirators. The jury sent a note to the court which read as follows:

"Is Count 1 the conspiracy between John Webber and Bob Suppenbach only or is

Syntech involved also on Count 1 ?"

"The court answered that '[t]he conspiracy charge does not name co-conspirators and the instructions do not confine jury consideration to particular companies or individuals. It will be the jury's responsibility to determine from the evidence if there was a conspiracy and, if so, what companies or individuals were involved." Id. 1 F.3d at 683 (emphasis added).

The court concluded that the trial "court properly instructed the jury that it would have to be guided by the evidence, instructions, and arguments in determining whether Centek was involved in Count 1. The court appropriately refused to tell the jury that Centek was not involved in the conspiracy....Although the indictment and the instructions required the jury to find that Suppenbach and Weber had conspired, they did not foreclose a finding that Kueser and Centek were also involved in the conspiracy." Suppenbach, 1 F.3d at 683.

Thus, while the court's supplemental jury instruction in Suppenbach was proper, in the case at bar, the court's supplemental jury instruction precluded the jury from acquitting petitioner Don Prince and convicting only Bill Prince of conspiring with Young. Indeed, in light of the circumstantial evidence against petitioner, it is more than probable that the jury entertained thoughts of acquitting petitioner; but that possibility vanished when the court instructed the jury that, if it should convict either of the defendants, it must convict the other on the conspiracy counts.

In a similar case, U.S. v. Glickman, 604 F.2d 625 (9th Cir. 1979), a case involving supplemental jury instructions on the conspiracy counts, the jury note read:

> "Judge Murray----Is the conspiracy charge against either defendant mean that the conspiracy has to be between Glickman and Rowe only?" Id. at 631.

After discussing the note with both parties, the court replied to the jury by a note which read: "No. There can be no conviction of one defendant without conviction of the other defendant in the case." Id. (There was disagreement as to the court's reply).

The appellants pointed out that the indictment also charged "others both known and unknown to the grand jury" and that the "jury might have found that conspiracy existed between only one of the appellants and one or more of the unnamed members of the conspiracy, but, on the basis of the supplementary instruction, erroneously concluded that the other appellant must also be convicted of the conspiracy charge. Glickman, 604 F.2d at 631.

After conducting a "plain error" review because the appellants had failed to challenge the supplemental jury instruction at trial, the court concluded that the error did not constitute plain error because the "evidence adduced at trial showed that only Glickman and Rowe were members of the conspiracy." *Id.* at 632.

Thus, the facts of Glickman are similar to case at bar with the exception that petitioner's indictment did not mention any other defendants. However, the government's evidence established that Young was a co-conspirator and the government admitted that the jury could properly find that Young was a co-conspirator. In Glickman, there was no evidence of other conspirators other than the two named in the indictment. Nevertheless, both courts gave supplemental jury instructions on the same question from the jury.

In short, the supplemental jury instruction in Glickman was considered not error since there was no evidence of any conspirators except the two named in the indictment. On the other hand, in the case at bar, the government produced evidence of another co-conspirator, George Young. Thus, here the court's supplemental jury instruction was error.

"A trial judge must be painstakingly impartial any time he communicates with the jury during deliberations. He must insure that any supplemental instructions are accurate, clear, neutral, and non-prejudicial." Suppenbach, 1 F.3d at 683.

In this case, the trial court's supplemental jury instructions were wrong in light of the government's evidence and admission that Young had conspired with someone. Thus, the jury should have been advised in the same manner as the jury in Suppenbach, that is, the jury should have been instructed that "the instructions do not confine jury consideration to particular.....individuals" and that is was "the jury's responsibility to determine from the evidence if there was a conspiracy and, if so, what.....individuals were involved." Id. (emphasis added). Instead, the court instructed the jury in a manner identical to the court in Glickman, that is, the court instructed the jury that, should it find one of the defendants guilty, it must convict the other defendant. Glickman, 604 F.2d at 631. Unlike the appellant in Glickman, petitioner objected at trial and the court noted the objection. *See* Appendix at F-9.

The influence of the trial judge on the jury is necessarily and properly of great weight and his lightest word or intimation is received with deference, and may prove controlling. Because of this influence, some errors in jury instructions — those "likely to remain firmly lodged in the memory of the jury and to excite prejudice" — simply cannot be cured by a statement that the court's opinions are not binding on the jury. Quercia v. U.S., 289 U.S. 466, 472, 53 S.Ct. 698 (1933).

Finally, petitioner would direct this Court's attention to the opinion in U.S. v. Hopkinson, 631 F.2d 665 (10th Cir. 1980). Hopkinson was indicted jointly with Michael Hickey for various offenses relating to an explosive bomb. The charges included, *inter alia*, conspiracy in violation of

18 U.S. C. § 371. Hopkinson was convicted, and Hickey acquitted, on all counts. An unindicted conspirator and government witness, Jeff Greene, was arrested and subsequently testified against Hopkinson at trial. Id at 666-67. Hopkinson appealed claiming that his convictions on all counts should be reversed because of the inconsistent verdicts since Hickey was acquitted on all counts. *Id.* at 668.

The court concluded that the "character and quality of the defenses of Hopkinson and Hickey were so different that the jury had a reasonable basis for return of different verdicts. Hopkinson had a motive"... and "[n]o motivation is shown for Hickey...." Id. The court went on to state:

> "The argument that the acquittal of co-conspirator Hickey on the conspiracy count precludes conviction of Hopkinson on that count is of no avail. The principle that one may not conspire with himself is of no materiality. Green was named as an unindicted co-conspirator. Green testified that he and Hopkinson acted in concert to make and transport the bomb. Accordingly, the acquittal of Hickey is immaterial." Hopkinson, 631 F.2d at 668.

Likewise, in this case, Young was an unindicted co-conspirator who testified that he had acted in concert with Bill Prince as well as petitioner. Moreover, the "character and quality of the defenses" of petitioner and Bill Prince "were so different that the jury had a reasonable basis for return of different verdicts." Bill Prince "had a motive" for the attempted murders. However, "no motivation is shown for" petitioner.

In sum, the opinions in Powell, Hopkinson, Glickman and Suppenbach, *supra*, establish that the jury in this case had reasonable justification, as well as a legal right, to return an inconsistent verdict. Thus petitioner contends that the trial court violated his due process rights by misinstructing the jury that, should the jury convict one defendant, the jury should also convict the

other defendant.

II. THE TRIAL COURT'S INSTRUCTION IMPROPERLY INFRINGED ON PETITIONER'S RIGHT TO A JURY TRIAL.

A jury may render an inconsistent verdict. See, eg., Dunn v. U.S., 284 U.S. 390 (1932); United States v. Dotterwich, 320 U.S. 277 (1963) (inconsistency in a verdict is not sufficient reason for setting it aside); Harris v. Rivera, 454 U.S. 339 (1981); United Sates v. Powell, 469 U.S. 57 (1984). Admittedly these cases arise in the context of appealing from a conviction on the grounds that it was inconsistent with an acquittal as to another charge. However, as Powell makes clear a jury may exercise leniency as to a particular charge and in so doing is performing its "historic function, in criminal trials, as a check against arbitrary or oppressive exercises of power by the Executive Branch." Powell, 469 U.S. at 65.

The issue then becomes whether a trial court may properly preclude the jury from exercising its historic function by instructing that if it finds a defendant - or here a co-defendant - guilty of a charge, it must then find the defendant guilty of an additional charge. Petitioner submits that to authorize the peremptory instructions given in this case would impermissibly limit his right to jury trial.

The failure of the court properly to instruct the jury about this alternative that was raised by the evidence deprived petitioner of his due process right to be tried by a jury which was properly instructed about how to apply the law to the evidence. The circumstance that the jury asked specifically what to do if the evidence proved that only one of the two defendants had participated makes it clear that the error was not harmless. Indeed, under the circumstances of this case to

require the jury to convict petitioner of conspiracy if it found his co-defendant Will Prince to be guilty deprived him of the presumption of innocence and the due process right to have his guilt proved beyond reasonable doubt. Moreover, the impact of this error undercuts the conclusion of the Court of Appeals that petitioner was not harmed by the trial court's error in admitting evidence that petitioner had aided a fugitive.

III. BECAUSE OF THE CONFLICT AND CONFUSION EXPRESSED BY LOWER COURTS WHEN INSTRUCTING A JURY ON "CLOSED-IN" CONSPIRACY CHARGES, THIS HONORABLE COURT SHOULD EXERCISE ITS POWER OF SUPERVISION TO PROVIDE THOSE COURTS WITH GUIDANCE.

In the case at bar, the trial court expressed a concern that the jury might return an inconsistent verdict on the conspiracy counts. On two different occasions, the court discussed the matter with the parties. The first time the court raised the issue, no decision was made as to what instruction to give the jury. *See* Appendix D-1 and D-2. The second time the matter was discussed, the trial court expressed its confusion:

> "THE COURT: I would stop if I had seen her. Let me just raise one question on the jury instructions, A boiler-plate page that says you got to consider each count on each defendant individually. And there's a sentence says the fact you may find one or more of the defendants guilty or not guilty of any offenses should not affect your verdict on any other offense.
> Well, technically, if they find guilt on count one or two [conspiracy counts], it's got to be against both defendants; right?
>
> THE COURT: The conspiracy counts couldn't find one guilty, the other not guilty on conspiracy." *See* Appendix E-1 (emphasis added).

The trial court continued to express its confusion:

> THE COURT: I never had a conspiracy before that was closed in.
>
> THE COURT: That's the problem, conspiracy other alleged members it would be

possible to find just one of the two defendants guilty. But, Ms. Wilson, Mr. Josey, Don't you agree that is is up or down all or nothing on counts one and two?

MS. WILSON: Your Honor, I understand what you're saying. But I know that all the time juries come back with inconsistent verdicts. And this could be one of those situations. But I understand.

THE COURT: I know. I'm trying to make in advance prevent that from happening, if I can.

MS. WILSON: Well, I think they have a right to have an inconsistent verdict, if they want to.

THE COURT: What do we do— hypothetically, if they convict one defendant, not the other on count one.

MS. WILSON: Nothing.

MR. SWERLING: Rule' 29.

MR. MOORE: Then we argue about whether it is inconsistent verdict, at that point. I hesitate to put the cart before the horse.

THE COURT: That's getting too far ahead. What do I need to say in the charge? *See* Appendix E-2 and E-3 (emphasis added).

Thus, it is clear that the trial court below was confused as to the proper response to the jury's question.

Similarly, in U.S. v. Glickman, 604 F.2d 625 (9th Cir. 1979), the court was faced with the same problem. After the jury began deliberations, it sent a note to the trial judge requesting additional guidance regarding the law of conspiracy. Subsequently, the court replied: "No. There can be no conviction of one defendant without conviction of the other defendant in the case." Id. at 631. Thus, the court provided supplemental instructions that were improper, in part, because the evidence revealed that other unindicted people participated in the offense — just as George Young in this case was an unnamed,

unindicted co-conspirator, unknown to the Grand Jury.

On the other hand, in U.S. v. Suppenbach, 1 F.3d 679 (8th Cir. 1993), faced with the same problem as the court below and the court in Glickman, the court provided completely different supplemental jury instructions. When the Suppenbach jury questioned the court concerning the conspiracy charge jury instruction, the court answered: "The conspiracy charge does not name co-conspirators and the instructions do not confine jury consideration to particular companies or individuals. It will be the jury's responsibility to determine from the evidence if there was a conspiracy and, if so, what companies or individuals were involved." Id, 1 F.3d at 683.

The supplemental jury instructions in this case and those in Glickman are a complete odds with this Court's decision in Powell, i.e., that inconsistent verdicts are permissible. As a result of the conflict and confusion of these lower courts, petitioner contends that the United States Supreme Court's guidance is necessary as to four basic questions.

First where an indictment names only two defendants in a criminal conspiracy charge, what is the proper jury instruction with which to permit inconsistent verdicts? Second, where an indictment names only two defendants in a criminal conspiracy charge but the prosecution's evidence established another conspirator who was unnamed and unknown to the Grand Jury and also unindicted, what is the proper instruction to the jury when the jury expresses a desire to acquit one of the defendants? Third, where an indictment names two defendants and others known and/or unknown to the Grand Jury, what is the proper instruction for the jury when it expresses a desire to acquit one of the

defendants? Finally, is it proper for a trial court to tailor jury instructions in a manner as to attempt to prevent an inconsistent verdict as the court did in the case at bar?

Petitioner submits that these are pressing questions that should be addressed and that this Court should provide guidance to the lower courts in order to maintain integrity in the judicial system. Federal prosecutions for conspiracy are myriad; and this case presents issues which could recur frequently in such prosecutions. The effect of failing to indict or even to mention in the conspiracy indictment a person whom the evidence proves to be a co-conspirator is unclear. The answers to these issues will clarify an area that today is uncertain and also will protect petitioner's rights to due process and jury trial.

Conclusion

For the above stated reasons as well as for those stated in the previously filed petition for certiorari, the petition for certiorari should be granted.

Respectfully submitted,

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